IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1394

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION,

Petitioner,

v.

AIR TRANSPORT ASSOCIATION OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

HERBERT PRASHKER
STANLEY FUTTERMAN
Attorneys for Respondents
1185 Avenue of the Americas
New York, New York 10036

Of Counsel:
POLETTI FREIDIN PRASHKER
FELDMAN & GARTNER
1185 Avenue of the Americas
New York, New York 10036
(212) 730-7373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1394

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION,

Petitioner,

v.

AIR TRANSPORT ASSOCIATION OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Air Transport Association of America ("ATA") and fifteen individual airlines,[1] respectfully

1. The caption chosen by Petitioner identifies only ATA as the Respondent. As indicated by the captions of the opinions of the courts below (Appendices A and B to the Petition), a number of individual airlines were parties to the proceedings below to adjudge Petitioner in civil contempt of court, and remain parties in this Court, aligned with ATA and represented by the same counsel. They are American Airlines, Inc., Braniff Airways, Inc., Continental Airlines, Inc., Delta Airlines, Inc., Eastern Airlines, Inc., Northwest Airlines,

(footnote continued on next page)

request that the Court deny the petition for a writ of certiorari seeking review of the judgment the United States Court of Appeals for the Second Circuit in this case, entered December 13, 1978.

Statutes Involved

Petitioner has omitted from its appendix of the statutes involved (Appendix C to the Petition) three statutes referred to in the Statement of the Court of Appeals, *Air Transport Association, et al.* v. *Professional Air Traffic Controllers Organization, et al.*, No. 78-7419 (2d Cir. Dec. 13, 1978) (Appendix A to the Petition ["App. A"]) and/or the Opinion of the District Court, *Air Transport Association, et al.* v. *Professional Air Traffic Controllers Organization, et al.*, 453 F. Supp. 1287 (E.D.N.Y. 1978), *aff'd*, No. 78-7419 (2d Cir. Dec. 13, 1978) (Appendix B to the Petition ["App. B"]). These statutes are 5 U.S.C. §7311 and §3333 and 18 U.S.C. §1918. The provisions of these statutes are set out in the Supplemental Statutory Appendix to this Brief.

Inc., Pan American World Airways, Inc., Trans World Airlines, Inc., United Airlines, Inc., Western Airlines, Inc., Allegheny Airlines, Inc., North Central Airlines, Inc., Ozark Airlines, Inc., Piedmont Aviation, Inc. and Southern Airways, Inc. (Appendix to the Briefs on Appeal below ["A"] 24). ATA is an unincorporated association whose members include all route air carriers certified by the Civil Aeronautics Board (Complaint, ¶2).

Petitioner has *not* served on any of the parties to the proceeding below a notice pursuant to Rule 21(4) of this Court that it believes any of these parties have no interest in the outcome of the Petition. Petitioner's failure to indicate these parties in the caption or otherwise refer to them in the Petition may, therefore, simply have been an oversight.

Counterstatement of the Case

Petitioner, Professional Air Traffic Controllers Organization ["PATCO"], seeks review of a judgment of the United States Court of Appeals for the Second Circuit which affirmed an order and judgment of civil contempt entered by the United States District Court for the Eastern District of New York holding PATCO in contempt for violation of a permanent injunction provided for in a final judgment entered on consent in 1970.

The 1970 Final Consent Judgment of Permanent Injunction

The 1970 Judgment was entered in an action commenced by Air Transport Association and a number of airlines in the United States District Court for the Eastern District of New York against PATCO, PATCO officers and some 200 individual air traffic controllers employed by the Federal Aviation Administration ("FAA") in the Eastern District of New York (A165).[2] The Complaint alleged that PATCO was conducting a concerted and continued work stoppage by FAA air traffic controllers, including the individual defendants, in violation of 5 U.S.C. §7311 (A165). Section 7311 prohibits an individual from accepting or holding a position in the Government of the United States if he "participates in a strike . . . against the government of the United States . . . ." The Complaint requested an injunction and damages (A165).

On the same date the Complaint was filed, the District Court, per the late Hon. Orrin G. Judd, issued a temporary restraining order (A165-166). On April 1, 1970 the United

---

2. The designation "A—" refers to the Appendix to the Briefs on Appeal below.

States instituted a similar action in the same court and Judge Judd issued to the Government a TRO similar to the one he had issued in the airlines' action (A76).

The work stoppage having continued despite the March 30 TRO, the airlines moved on April 6, 1970 to have defendants adjudicated in contempt of court (A166). On April 7, 1970 Judge Judd denied the defendants' motion to dismiss the airlines' complaint for lack of standing, *Air Traffic Controllers Organization, et al.*, 313 F. Supp. 181, 183-184 (E.D.N.Y. 1970), *rev'd in other respects sub nom., United States* v. *Professional Air Traffic Controllers Organization, et al.*, 438 F.2d 79 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971). Further restraining orders were issued during April 1970, the court noting that "the Norris-LaGuardia Act does not apply to strikes by United States government employees," 313 F. Supp. at 184. On May 5, 1970, with the defendants' consent, Judge Judd entered an order granting preliminary injunctions in both the airlines' and the Government's actions, pending trial and final judgment, *id.* at 186-90.[3] Both the United States and the airlines objected to the condition attached to these preliminary injunctions—that the FAA refrain from imposing any administrative sanctions on the individual controllers who returned to work; that condition was ultimately striken on appeal, *United States* v. *Professional Air Traffic Controllers Organization, et al.*, 438 F.2d 79 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971). Following the entry of the preliminary injunctions, what remained of the airlines' action was (1) their application for a permanent injunction; (2) their claim for damages in the plenary action arising out of the prior violations of federal law; and (3) their motion for an adjudication of contempt of the March 30 restraining orders, including damages for contempt (A166; App. B., p. 18). The total provable damages exceeded $50,000,000 by the airlines' estimates (A167; App. B., p. 18, n. 2).

3. The Memorandum Opinions reported at 313 F. Supp. 181 relate to orders issued on April 7, April 13, and May 5, 1970; they do not, contrary to the statement in the Petition, p. 3, set forth the basis for the final consent judgment of *permanent* injunction entered on September 9, 1970, for whose violation PATCO was adjudged in 1978 to be in civil contempt.

The parties entered into a written Stipulation of Settlement on September 9, 1970 (A169; A299-304). The Stipulation of Settlement provided for two final judgments of permanent injunction to be entered in the form annexed to the Stipulation (A302). In consideration of the entry of these judgments, plaintiffs waived their claims for damages against the defendants and withdrew their motion for an adjudication of defendants in contempt for violation of the March 30 restraining order (*ibid.;* App. B., p. 19). One of the final judgments was entered immediately against PATCO, its officers and directors. It provided, in language similar to that which counsel for PATCO had proposed in a written settlement proposal (A168-69; App. B., p. 18):

> "I. That the said defendant PATCO, its officers, agents, employees and members, its successors or assigns, and any other person acting in concert with it or them, is permanently prohibited and enjoined from, in any manner, calling, causing, authorizing, encouraging, inducing, continuing or engaging in a strike (including any concerted stoppage, slowdown, or refusal to report to work) by air traffic controllers employed by an agency of the United States, or any other concerted, unlawful interference with or obstruction to the movement or operation of air craft or the orderly operation of any air traffic control facilities by an agency of the United States" (A35-36).

This Judgment further provided that in addition to any other remedies plaintiffs might have for future violations of the injunction, PATCO would be required to pay $25,000 per day to ATA or its assignee for "any action which violates the terms of paragraph '1' " (A36). The Judgment was made subject to vacatur if Congress or the Supreme Court of the United States should determine by legislation or decision that federal employees have a legal right to strike (A36). Neither of these conditions has occurred.

The Stipulation of Settlement also provided for the entry, "not less than two years from the date" of the Stipulation, of a separate final judgment of permanent injunction against the individual defendant controllers. Each of the individual controllers was afforded the right to move to dismiss the complaint against him, or for summary judgment in his favor, on specified grounds (A299-301). None of the individual defendants so moved (App. B., p. 20, n. 2), and a final judgment of permanent injunction against the individual defendant controllers was accordingly entered on consent on October 20, 1972, subject to the same conditions for vacatur as in the case of the final judgment against PATCO (A38-42).

The 1978 Contempt

The FAA has, for many years, permitted air traffic controllers to request airlines voluntarily to allow them to observe operations in flight from the cockpit "jump seat," for the purpose of familiarizing themselves "with the in-flight problems affecting [air traffic control] and communi-

cations" (A29; A46-51). A new labor agreement between FAA and PATCO, effective March 15, 1978, permitted FAA controllers not engaged in overseas operations to request the airlines, for the first time, to provide them with free overseas flights, provided that the newly authorized overseas trips could not be made on "duty time" (A29-30; A60-61).

On May 24, 1978 the *Washington Post* reported on a press conference held by John Leyden, President of PATCO, at which Leyden reportedly stated, among other things, that the controllers were angry at the frequent refusal of several carriers to let them ride in cockpits as observers of overseas inflight techniques, and predicted a "spontaneous" slowdown by PATCO members (A28; A43, App. B., p. 20).

Beginning on the afternoon of May 25, 1978 several airlines experienced delays as a result of abnormal handling by air traffic controllers of their flights, which appeared to be the result of a deliberate slowdown by the controllers (A28; A44-45). On May 26, 1978 plaintiffs obtained an order to show cause why PATCO, Leyden, and the members of PATCO's board of directors should not be adjudicated in civil contempt for violating the final judgments of September 9, 1970 and October 20, 1972 (A22-26). Beginning on June 6, 1978 delays apparently resulting from controller slowdowns were experienced by the airlines generally (A153).

On June 22, 1978 the parties entered into a Stipulation, "so ordered" by the District Court on June 23, 1978, which avoided the necessity for any trial of the facts or further discovery, and defined the legal issue to be determined by

the District Court (App. B., p. 15). The Stipulation provided:

> "7. PATCO asserts, and by this stipulation retains its right to assert, that the aforementioned injunction against PATCO was not valid and effective as against PATCO on May 25 and 26, 1978 and on June 6 and 7, 1978.
>
> "8. If it be determined by this Court that the aforesaid injunction against PATCO was valid and effective on the aforesaid dates, it is agreed that for the purposes of this motion only, and without prejudice to PATCO's reserved rights under paragraph 7, PATCO shall be deemed to have disobeyed the prohibitions of said injunction with respect to slowdowns by air traffic controllers on May 25 and 26, 1978 and June 6 and 7, 1978" (A188).

The Stipulation further provided that, in the event of PATCO's adjudication in contempt pursuant to the Stipulation, PATCO shall pay ATA the sum of $25,000 with respect to each of the four days on which violations were deemed to have occurred, or a total of $100,000 (A188).

In arguing to the District Court that the 1970 injunction against PATCO was "not valid and effective" in May and June, 1978, PATCO relied almost entirely on the decision of the United States Court of Appeals for the Second Circuit in *New York Telephone Co.* v. *Communications Workers,* 445 F.2d 39 (1971). PATCO argued that the case

> "stands for the proposition that an injunction issued in a particular controversy, and designed to restrain conduct arising out of that controversy, may not lawfully be used as a predicate to cite violators for contempt when the matter of the dispute has altered substantially and the original matter has been concluded" (A117).

PATCO's only mention before the District Court of the Norris-LaGuardia Act, 29 U.S.C. §101 *et seq.,* which has so prominent a place in PATCO's Petition for a writ of certiorari, was in speculating that plaintiffs had chosen to proceed against PATCO by way of contempt, rather than through seeking a new injunction with respect to the 1978 slowdown, out of concern that "Norris-LaGuardia would bar Federal Court jurisdiction" of a suit for an injunction (A287).

The District Court rejected PATCO's argument that the 1970 judgment of permanent injunction was not valid and effective against PATCO in May and June, 1978:

> "In summary then, this Court is convinced that the parties, in negotiating and executing the stipulation upon which the permanent injunction was entered on September 9, 1970, intended the same [quoted above, p. 5] to be fully applicable to all future violations thereof by PATCO, that adequate consideration supported this stipulation and injunction, and that enforcement of it by this court at this time is further supported by the statutory prohibitions of strikes by federal governmental employees. Accordingly, said injunction is still in full force and effect . . . ." (App. B., p. 25).

Before the Court of Appeals, PATCO again placed principal reliance on its contention that "the 1970 injunction was not applicable to defendant PATCO as to the alleged events occurring on May 25 and 26, 1978 and on June 6 and 7, 1978 . . . ." (Memorandum on Behalf of Defendant-Appellant, Point I, p. 7). PATCO did not argue that the Norris-LaGuardia Act itself barred an adjudication of contempt but that "the principles of the Norris-LaGuardia Act are applicable in this case" (*id.,* Point II, p. 11). The

only provisions of the Norris-LaGuardia Act to which PATCO referred were section 9, dealing with the form of an injunction in a labor dispute (*id.*, pp. 11, 12), section 13(c) covering the definition of the term "labor dispute" (*id.*, p. 12), and section 8, requiring a complainant "to make every reasonable effort to settle such dispute . . . ." (*id.*, p. 15).

The United States Court of Appeals affirmed the judgment of the District Court, issuing an unpublished opinion, which is not to be reported, cited or otherwise used in unrelated cases (App. A, p. 11). It stated in part:

> "The literal language of the 1970 decree prohibits the 1978 slowdown. However, appellants argue in effect that the 1970 decree should be construed as prohibiting any *continuation* of the 1970 activities. We disagree.
>
> * * *
>
> "Here we are dealing with a *permanent injunction* drafted by PATCO and consented to by it with the advice and assistance of competent counsel. The parties clearly agreed to override any policy that might be expressed in §9 of the Norris-LaGuardia Act.
>
> "Accordingly, we hold that the September 9, 1970, *permanent* injunction means what it says—that it is permanent—and applies to the slowdowns conducted by appellants in May and June, 1978." (App. A, pp. 13-14, emphasis in original.)

Reasons Why the Writ Should Be Denied

I. The Questions Raised in the Petition Are Not Raised by the Decision Below Nor by the Record; the Questions Which Are so Raised Are Not Presented for Review, and Would Not Merit the Exercise of Certiorari Jurisdiction.

A. Petitioner states that the first question presented by its petition is:

> "1. Whether the Norris-LaGuardia Act applies to a suit by a private party against federal employees and their union?"

The Court of Appeals did *not* decide this question, Petitioner does not purport to answer it here, and it is not, accordingly, presented by the case.

The Court of Appeals simply said that "the Norris-LaGuardia Act has no application, *at least in a suit by the Government,* to alleged strikes or slowdowns by Government employees" (emphasis added), and held, as to the 1970 suit by these private plaintiffs, that inasmuch as the consent judgment was "drafted by PATCO and consented to by it with the advice and assistance of competent counsel," "the parties clearly agreed to override any policy that might be expressed in §9 of the Norris-LaGuardia Act" (App. A, p. 13).

Petitioner does not argue here that the parties to the 1970 consent judgment did not, by that consent, override any policy in §9 of the Norris-LaGuardia Act which might have inhibited an injunction in the form consented to. Any such argument could, in any event, have only the most

limited applicability and would not merit review by this Court on certiorari.

B. Petitioner states that the second question presented by its petition is:

> "2. Whether a federal employee union may be held in contempt of an injunction which is so broad and vague that it violates the Norris-LaGuardia Act, 29 U.S.C. §101 et seq.?"

The Court of Appeals did *not* decide this question, and it is not presented by this case. As shown by the statement of the court quoted above, there was no occasion to reach that question because "the parties clearly agreed to override any policy that might be expressed in §9 of the Norris-LaGuardia Act." Petitioner does not claim in this Court, nor did it claim below, that the parties lacked capacity to overrule by their agreement any policy that might be expressed in section 9 as to the form of an injunction.

C. Petitioner states that the third question presented by its petition is:

> "3. Whether in 1978 a party may be held in contempt of injunctions which were issued in 1970 and 1972, and which arose out of an entirely different dispute and which relate to a separate and distinct controversy?"

The Court of Appeals did not answer this question, and, like the first two questions, it is not presented by this case. Passing the point that the only injunction which petitioner has been held to have violated is the 1970 permanent consent injunction entered against PATCO, not the 1972 injunction entered against the individual controllers, the

court specifically held that "the September 9, 1970 *permanent* injunction means just what it says—that it is permanent—and applies to the slowdown conducted by appellants in May and June, 1978" (App. A, p. 14). In short, the court held that the September 9, 1970 final judgment of permanent injunction did relate to future work stoppages and slowdowns, not to the spring 1970 work stoppage which was already over by the time that final judgment was entered.

Insofar as the courts below held Petitioner in contempt of an injunction which in some special sense may be said to have arisen "out of an entirely different dispute and which relate[s] to a separate and distinct controversy," the courts did so on the basis of the intentions of the parties, as indicated by the language chosen by the parties in framing the consent judgment of permanent injunction, and the surrounding circumstances. Whether the courts were correct in their determination of the parties' intent is not a question which merits the exercise of this Court's certiorari jurisdiction.

II. The Present Case Does Not Present the Question Whether the Norris-LaGuardia Act Applies to Suits by Private Parties Against Government Employees.

Petitioner states that:

> "There is no case law on whether the [Norris-LaGuardia] Act is . . . inapplicable to a suit prosecuted by a private party against a strike or other kind of job action by federal employees or their union. The instant case offers this Court the opportunity to establist what the law in such situations shall be" (Petition, p. 4).

This case offers no such opportunity. PATCO did not argue below either that the Norris-LaGuardia Act applied to the airlines' original suit against PATCO in 1970 nor that the Act renders invalid the final judgment of permanent injunction to which PATCO consented in settlement of that suit. Its argument has been that the policy exressed in section 9 of the Act is applicable in determining the parties' intent in framing the language of the 1970 consent judgment of permanent injunction. The Court of Appeals specifically held, however, that "the parties clearly agreed to override any policy that might be expressed in §9 of the Act" (App. A., p. 13).

Moreover, petitioner is barred by settled principles of the law of contracts and res judicata from attacking, as incompatible with Norris-LaGuardia, the 1970 final judgment as to which it has been adjudged in contempt. First, PATCO's consent to that final judgment, for consideration which included the waiver by plaintiffs of $50 million in damage claims, itself bars such an attack. *See NLRB* v. *Ochoa Fertilizer Corp.,* 368 U.S. 318 (1961); *McComb* v. *Jacksonville Paper Co.,* 336 U.S. 187 (1949); *NLRB* v. *San Francisco Typographical Union,* 465 F.2d 53, 57 (9th Cir. 1972); *NLRB* v. *International Hod Carriers, Local 210,* 228 F.2d 589, 592, n. 3 (2d Cir. 1955); *New York Telephone Co.* v. *Communications Workers,* 445 F.2d 39, 52 (2d Cir. 1971) (concurring and dissenting opinion). Second, for obvious reasons of finality, a party cited for civil contempt may not collaterally attack the validity of the permanent injunction it is charged with violating, *Bethlehem Mines Corp.* v. *United Mine Workers,* 476 F.2d 860 (3d Cir. 1973); *NLRB* v. *Local 282, Int'l Bhd. of Teamsters,* 428 F.2d 994, 999, *vacated on other grounds,* 438 F.2d 100 (2d Cir. 1970).

III. The Decision of the Court Below Is Not in Conflict with Decisions of this Court, nor with Decisions of the Same or Other Courts of Appeal, and Is Clearly Correct.

Petitioner asserts that "the decision below is in direct contradiction" of the statement in *Terminal Railroad Association of St. Louis* v. *United States,* 266 U.S. 17, 29 (1924) that "in contempt proceedings . . . a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought . . ." (Petition, pp. 6-7).

The Court of Appeals' interpretation of the 1970 final judgment was made precisely in the light of the surrounding circumstances, including the facts, as the Court of Appeals stressed, that "here we are dealing with a *permanent injunction* drafted by PATCO and consented to by it with the advice and assistance of competent counsel" (App. A, p. 13), and that in consideration of the entry of a final judgment of permanent injunction "plaintiffs were giving up their right to pursue their action for $50 million damages and an adjudication of contempt, which, if successfully pursued, could have had serious and far-reaching consequences for PATCO and the controllers" (*ibid.*).

Similarly, there is no inconsistency between the decision below and the decisions of other Courts of Appeal interpreting other decrees in the light of the circumstances of those cases.

Nor is there any conflict, as PATCO asserts, between the decision below and the decision of another panel of the

same court in *New York Telephone Co.* v. *Communications Workers*, 445 F.2d 39 (1971). The Court of Appeals contrasted the "*temporary restraining order*, drafted by the employer and intended to apply to a particular work stoppage," at issue in *New York Telephone*, with the "*permanent injunction* drafted by PATCO and consented to by it with the advice and assistance of competent counsel" (App. A, p. 13, emphasis in original). Petitioner simply ignores this distinction (see Petition, pp. 9-10).[4]

Conclusion

For the reasons set forth herein, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

HERBERT PRASHKER
STANLEY FUTTERMAN
Attorneys for Respondents
1185 Avenue of the Americas
New York, New York 10036

Of Counsel:
POLETTI FREIDIN PRASHKER
FELDMAN & GARTNER
1185 Avenue of the Americas
New York, New York 10036

4. In any event, if the vice of the decision below is that it conflicts with a decision by another panel of the same circuit, the remedy is a petition for rehearing by the Court of Appeals in banc, so as "to secure or maintain uniformity of its decisions," Federal Rule of Appellate Procedure 35(a), *not* a petition for certiorari.

SUPPLEMENTAL STATUTORY APPENDIX

5 U.S.C. §7311

§7311. Loyalty and striking

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 524.)

5 U.S.C. §3333

§3333. Employee affidavit; loyalty and striking against the Government

(a) Except as provided by subsection (b) of this section, an individual who accepts office or employment in the Government of the United States or in the government of the District of Columbia shall execute an affidavit within 60 days after accepting the office or employment that his acceptance and holding of the office or employment does not or will not violate section 7311 of this title. The affidavit is prima facie evidence that the acceptance and holding of office or employment by the affiant does not or will not violate section 7311 of this title.

(b) An affidavit is not required from an individual employed by the Government of the United States or the government of the District of Columbia for less than 60 days for sudden emergency work involving the loss of human life or the destruction of property. This subsection does not relieve an individual from liability for violation of section 7311 of this title.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 424.)

18 U.S.C. §1918

§1918. Disloyalty and asserting the right to strike against the Government

Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia;

shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both.

(Added Pub. L. 89-554, §3(d), Sept. 6, 1966, 80 Stat. 609.)